

Huynh (Migration) [2020] AATA 6097 (11 December 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Thu Lan Huynh
CASE NUMBER:	1805439
HOME AFFAIRS REFERENCE(S):	BCC2015/2868345
MEMBER:	David Crawshay
DATE:	11 December 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 11 December 2020 at 4:45pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – insufficient evidence to demonstrate that the applicant was the spouse of the sponsor – relationship had ended –an Australian citizen child – child was a product of another relationship – strong compassionate circumstances – referred to the minister – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65, 351, 359

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 February 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 30 September 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) because the applicant did not meet the definition of spouse under s.5F of the Act. Specifically, the delegate found that there was insufficient evidence to demonstrate that the applicant was the spouse of the sponsor. A copy of the delegate's decision was submitted to the Tribunal by the applicant.
4. On 14 September 2020, the applicant wrote to the Tribunal via email requesting the hearing previously set down for 6 October 2020 be postponed until a date when the hearing could be conducted face-to-face. On 15 September 2020, the Tribunal wrote to the applicant to inform her that, while it still considered it appropriate to hear her matter via videoconference, the hearing was postponed.
5. The applicant's email of 14 September 2020 also stated that she did not live with the sponsor anymore and she had a 17-month-old Australian citizen child.
6. Based on this information and on other, unrelated, information from Centrelink that the Tribunal considered adverse, it wrote to the applicant on 16 September 2020 under s.359A and s.359(2) of the Act.
7. Concerning the s.359(2) element of the letter, it relevantly stated as follows:

...

Background

On 14 September 2020, you sent an email to the Tribunal that said that you do not live with your sponsor, Mr Dang Henry Ho, anymore and that you have a 17-month-old Australian citizen child.

It is a requirement under cl.820.221(1)(a) of the Migration Regulations for you to continue to be the spouse of the sponsor at the time of decision unless an exception applies – such as in cl.820.221(2) relating to the death of the sponsor; cl.820.221(3)(b)(i) relating to family violence committed by the sponsor; or cl.820.221(3)(b)(ii) relating to custody, access or other order that you have in relation to a child of the sponsor.

These parts of the Regulations have been **attached** to this letter for your convenience.

Request for information

You are invited to provide information in writing in relation to whether or not your relationship with your sponsor has ceased and, if it has ceased, whether one or more of these exceptions applies to you. [emphasis in original]

...

8. Concerning the s.359A element of the letter, it relevantly stated as follows:

...

In conducting the review, we are required by the *Migration Act 1958* to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

Please note, however, that we have not made up our mind about the information.

The particulars of the information are as follows:

- Information from the Department of Human Services (Centrelink) accessed on 4 September 2017 shows that your sponsor, Mr Dang Henry Ho's marital status was "single" at that point and had been "single" since 4/3/1995 (i.e. since birth).

This information is relevant because it suggests that your sponsor has not represented himself as being in a married relationship with you to a major Government agency. If the Tribunal relies on this information in making its decision, it may cause the Tribunal to call into question whether the relationship between you and the sponsor has ever been genuine and continuing (as per s.5(2)(c) [sic] of the *Migration Act*).

If the Tribunal relies on this information in making its decision, it may cause the Tribunal to call into question whether you and the sponsor were ever in a relationship. It may therefore cause the Tribunal to not be satisfied that you meet subclause 820.211(2)(a) and subclause 820.221(1) of Schedule 2 to the Migration Regulations.

This would be the reason, or a part of the reason, for affirming the decision under review. [emphasis in original]

...

9. On 30 September 2020, the applicant sent an email to the Tribunal that relevantly provided as follows:

...

I would like to comment on the information in the letter sent to me by the tribunal.

Regarding the Information from Centrelink, I could not contact my husband for an explanation about his single status in Centrelink. However, our relationship was genuine and continued until June 2018. Also, I believe that the information of the Government that my husband was single does not mean that my husband and I were ever in a genuine relationship.

We were in a genuine marriage relationship until June 2018. Our relationship broke because of domestic violence. My husband was a controlling man and abused me financially. I left him because I had too much pressure when living with him in a relationship. I was a victim of family violence by my husband.

After leaving my husband, I met a man and had a daughter with him. My daughter is an Australian citizen. I hope I can be granted a visa to stay in Australia to look after my daughter.

...

10. The applicant appeared before the Tribunal on 26 November 2020 to give evidence and present arguments. The hearing was held remotely via Microsoft Teams (MS Teams) video.
11. The Tribunal was assisted by an interpreter of the Vietnamese and English languages.
12. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

13. The applicant was born in Vietnam and travelled to Australia on a Higher Education Sector visa (TU-573), arriving on 13 February 2014.
14. The applicant claims to have moved into an address with her grandparents, and to have found employment at a beauty salon run by the sponsor's mother before her English course began. The applicant claims that the sponsor also worked there at that stage as a cleaner, and that he asked her out to a café and they exchanged contact details. She claims that the parties then communicated with each other nightly.
15. The applicant claims to have moved out of her grandparents' house and in with the sponsor's family after about a month. She claims that the sponsor's family agreed to accommodate her at their address in Springvale South after she complained about her grandparents being too strict.
16. The applicant claims that in late-March 2014 the parties began a boyfriend-girlfriend relationship that continued for a year until March 2015 when the sponsor proposed to her. The parties married in August 2015 in Springvale South and the visa application was lodged 30 September 2015.
17. In September 2016, the parties celebrated a wedding reception at a restaurant in Keysborough.
18. The applicant claims that in around March or April 2017, she discovered that the sponsor had fathered a child to another woman. She claims that the parties tried to resolve their differences but to no avail and the applicant left the Springvale South address in the middle of 2018.
19. The applicant claims that she gave birth to a daughter in April 2019 to another man who was an Australian citizen at the time. As such, she claims that her daughter is an Australian citizen.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the applicant is the spouse of the sponsor under s.5F of the Act and the time of application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

21. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

22. “Spouse” is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties’ household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

23. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a copy of a certificate for a marriage that took place on 7 August 2015. The certificate states that the marriage was solemnised in accordance with the *Marriage Act 1961*. The Tribunal is satisfied that the certificate is genuine and that the parties were free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

24. The Tribunal has considered evidence found on the Department and Tribunal files, including evidence given by the applicant in response to a request of 6 March 2020 from the Tribunal for information about her relationship with the sponsor and evidence in response to its s.359A/s.359(2) letter of 14 September 2020. It has also had regard to her testimony at hearing.

Financial aspects of the relationship

25. The Tribunal has considered the financial aspects of the parties’ relationship, including any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses.
26. The parties have not provided any evidence to show that they jointly own any real estate or other assets, or that they have any joint liabilities. The applicant submitted a letter addressed to her dated 15 August 2017 in relation to insurance for a car, and although both parties are named as insured drivers there is no evidence to show that this car was jointly owned by the parties. At the hearing, the applicant told the Tribunal that it was bought under her name.
27. The applicant told the Tribunal at hearing that the parties operated a joint bank account. In support of this claim, the applicant submitted statements from an account from August 2015 (when the account opened) until August 2017. These statements show that there has been some operation of the account over that time. Many of these transactions comprise transfers to and from an account ending in xx5829, and these are said to be for purposes such as “petrol”, “savings”, “allowance” and “rent and bills”. It is not clear why these transfers were made or who they were made to or from, although some of them are described as “petrol”, “savings” and “allowance”.

28. At hearing, the applicant said that the sponsor had initially been depositing his income into this account but then transferred money from this account to his personal account – these amounts were typically between \$1,000 and \$2,000. The Tribunal notes that some of the statements provided show deposits that appear to be salary payments from a construction company, suggesting that the sponsor uses the account to receive his salary (given that he was elsewhere listed as being in demolitions) although these payments are invariably followed by transfers of similar amounts to either or both of the xx5829 account and another account ending in xx9335.
29. Invoices and other documents from the parties' wedding, including in respect of the applicant's wedding dress, the wedding rings and hire of the venue, were submitted to the Tribunal. While it considers that these invoices are evidence that the parties ordered items in relation to their wedding in September 2016, they do not show how the items were paid for, including whether the parties paid for these jointly. For that reason, they are given diminished weight of a positive nature by the Tribunal.
30. Three money transfer receipts were submitted dated May and September 2017. These transfers were addressed to the applicant's father in Vietnam from the sponsor. They are sizeable, totalling almost \$20,000. At hearing, the applicant was asked the reason for these transfers, and she replied that they were given to her parents to repair their house in Vietnam. She said that the sponsor sent the money. When asked how he was able to afford to send this amount of money, she said that he was working five days-a-week and also working on weekends. The Tribunal put it to the applicant that this was implausible given that the sponsor was already taking out money from the parties' joint account and he did not show a commitment to pay for things that she wanted. It said that it was more plausible that the transfers were made by either her alone or in combination with the sponsor. The applicant then told the Tribunal that she used her savings as well. It asked her what the split between the parties was – she said that she contributed \$5,000 and the sponsor \$10,000.
31. A letter addressed to the sponsor and dated 17 September 2015 from a superannuation fund states that the sponsor had made a binding nomination in favour of the applicant for superannuation purposes. At hearing, the Tribunal put to the applicant that this nomination would not have been renewed after its expiry in September 2018.
32. Turning lastly to the basis of any sharing of day-to-day household expenses, the applicant stated through a letter from her then-representative dated 28 August 2017 that she and the sponsor lived with the sponsor's mother and contribute \$1,000 to household expenses including food, board and utilities. It said that the sponsor's mother takes care of all utility bills. At hearing, the Tribunal commented on the lack of evidence to show these transfers, and the applicant told it that the money was paid in cash.
33. The Tribunal has considered and balanced the evidence submitted by the parties in relation to the financial aspects when assessing their relationship. It finds that there is no evidence the parties have any joint ownership of real estate or other assets or that they bear any joint liabilities, and this evidence is given no weight either way. It finds that the sponsor made a binding superannuation nomination in September 2015 but it is not satisfied that this nomination was renewed upon its expiry in September 2018. While it gives this evidence positive weight at the time of application as evidence of legal obligations owed, it gives it no weight at the time of this decision. The Tribunal finds that the parties opened a joint bank account in August 2015. While it finds that the account was used for small food and petrol-related purposes, it appeared to be used for a period from at least August 2016 until the end of the available statements to receive the sponsor's income before that money being mostly transferred to another two accounts so that little money remained in the joint account. In that regard, it appeared to be used in an irregular manner and was not indicative of a couple who are seeking to pool their financial resources. This evidence is given little weight in favour of

the relationship at the time of application and, given that no evidence has been submitted since August 2017, no weight at the time of this decision. In the absence of evidence to substantiate the applicant's claim of making payments of \$1,000 to the sponsor's mother, the Tribunal is not satisfied that the parties made them, and this evidence is given little positive weight. Finally, the Tribunal accepts that money transfers totalling almost \$20,000 were made to the applicant's family in Vietnam. While these transfers would ordinarily be given substantial positive weight by the Tribunal, the weight in this instance is diminished significantly because it appears that the applicant contributed all or at least some of these payments.

34. The Tribunal considers that the evidence in relation to the financial aspects of the parties' relationship is not indicative of them being in a genuine and continuing relationship at the time of application or at the time of this decision.

Nature of the household

35. The Tribunal has considered the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
36. In her email of 14 September 2020 to the Tribunal, the applicant said that she had a 17-month-old child who she claims is an Australian citizen. As above, the Tribunal wrote to the applicant on 16 September 2020 seeking more information about, among other things, whether she has custody of, access to or an order in relation to a child of the sponsor. Her response indicated that this child was a product of another relationship and she confirmed this at hearing. Moreover, she confirmed that the sponsor had a child with another woman and there is no evidence to show that the applicant had any responsibility for the care and support of this child. The Tribunal finds that the parties have never had any joint responsibility for the care and support of children.
37. Regarding the parties' living arrangements, in her relationship statement of September 2015 the applicant claims that she began living with the sponsor and his family in March 2014 after having spent a month living at the house of her grandparents. She claims that the sponsor's mother, who was her employer at a nail salon, invited her to stay at her house in Springvale South. She said that she would be dropped off at university by the sponsor in the morning and would have meals with his family at night. In his corresponding statement, the sponsor said that the applicant began living at his house in March 2015, a claim that he repeated in the same sentence. Despite this, the Tribunal accepts that this may be a typographical error and that he meant March 2014. In support of the parties' claim to have been living at the sponsor's house, the applicant has submitted several pieces of correspondence and other documents addressed to one or both of the parties at that address. The last of these documents is a water bill dated 14 May 2018.
38. The Tribunal finds that the parties have represented themselves to third parties such as utility companies and their bank as living at the same address in Springvale South at the time of application and up until relatively recently in 2018. While it accepts that this may be the case and the parties were living under the one roof, it finds that they have otherwise submitted little if any evidence that speaks to their living arrangements during this time and how this reflects their claimed relationship. It is open to the Tribunal, based on the evidence before it including evidence about the sponsor's commitment to the relationship and evidence that the applicant became close to the sponsor's mother, to conclude that the applicant had been taken in to live at the sponsor's house by the sponsor's mother (and her then-employer) and that this continued to be her reason, or the main reason, for living there and not the claimed relationship between her and the sponsor. In this regard, the Tribunal asked the applicant at hearing whether she felt she had a stronger attachment to the

sponsor's mother than to the sponsor. She replied that she was very close to her because she worked for her. While the Tribunal finds that the parties had been living under the one roof at the time of application, it gives little positive weight to the evidence in its consideration of the nature of the parties' household at that time.

39. The applicant has since made an admission that she is not living with the sponsor but lives at another address in Springvale South. The applicant was questioned at hearing about these circumstances and she replied that she moved out in 2018 and has not spoken to the sponsor since then.
40. Turning lastly to the issue of the sharing of any housework, the parties had not provided any evidence on this point by the time of the hearing. At hearing, the applicant told the Tribunal that she would cook dinner with the sponsor's mother and would mop and vacuum. This evidence is given some weight of a positive nature by the Tribunal for at the time of applicant but it again notes that the parties no longer claim to live together and to therefore share responsibility for housework at the time of this decision.
41. The Tribunal has considered the parties' evidence in relation to the nature of their household, including in respect of their living arrangements. It finds that the applicant may have been living under the same roof as the sponsor at the time of application, albeit more as an employee of the sponsor's mother and not as the girlfriend and later the wife of the sponsor. However, it finds that the parties are no longer living together based on the admission by the applicant of the same. This evidence does not indicate that the parties live together, or do not live separately and apart on a permanent basis, at the time of this decision.

Social aspects of the relationship

42. The Tribunal has considered the social aspects of the parties' relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities.
43. The Tribunal has seen two Form 888 statutory declarations from people who claim to know the parties – one identified as a friend and the other as a family friend. The two declarants claimed to visit the sponsor's family often and to see the parties together as a couple. The two declarations were completed in the second-half of August 2015, after the parties had been married, and yet both declarants appeared to be unaware that the parties had married – with both referring to the applicant as the sponsor's "girlfriend". This caused the Tribunal to question whether the parties had represented themselves to friends and family friends as being in a married relationship. At hearing, this issue was discussed with the applicant, who told it that the declarants were witnesses to the parties' marriage. It told her that it could not confirm this as she had only provided a decorative certificate and the signatures of the witnesses did not appear to match those on the Form 888 statutory declarations (the Tribunal has since sighted their registered certificate which confirms that the two declarants were not witnesses). The applicant told the Tribunal that the parties were boyfriend and girlfriend at this stage, but the Tribunal pointed out that they had in fact been married at that stage. The applicant appeared to labour under the misapprehension that the parties had only registered to be married. The Tribunal told her that her attitude may have indicated that the parties did not consider themselves to have been married at the time she applied for the visa. This evidence is given weight of an adverse nature by the Tribunal for at the time of application given that the visa was applied for just over one month after these declarations were completed.

44. Other evidence attesting to the social aspects of the relationship includes photographs of the parties for dates in 2014 to 2017, and the letter of 28 August 2017 from the applicant's then-representative. The photographs show the parties in the presence of their families and some friends in casual and social situations. There are photographs that were taken at the parties' wedding reception which took place in September 2016 at a restaurant in Keysborough. The photographs show that the reception was attended by members of the sponsor's family as well as the applicant's family including some from Vietnam. At hearing, the applicant told the Tribunal that there were six tables of guests and the attendees were her maternal grandmother and her mother, along with the sponsor's family and some friends of the sponsor's mother. The Tribunal acknowledges the presence of close family members on both sides. This evidence is given weight in favour of the relationship by the Tribunal.
45. Information from Centrelink showed that the sponsor had not changed his marital status on the agency's systems as at the date the records were accessed in September 2017 and he represented himself as being single despite getting married over two years earlier. This information was the subject of the s.359A/s.359(2) letter (see above) to which the applicant replied that she could not contact the sponsor for an explanation about his single status and this did not mean that the parties were never in a genuine relationship. The Tribunal has considered the information and has chosen to give it some weight of an adverse nature as it tends to show that the sponsor has not represented himself to a major government agency as being married. However, the adverse weight is diminished as the evidence shows that the sponsor had not been a recipient of Centrelink payments since 2011 and may therefore have not had the need to update his details regularly.
46. The representative's letter of August 2017 said that as the sponsor was working night shifts six nights-a-week in demolitions, the parties have little time for socialising with friends. While this claim may be true at that time, the Tribunal notes that the sponsor was previously working daytime hours in his jobs at his mother's beauty salon and at the DFO. Although the Tribunal considers that the parties may not have been in a position to amass a large body of evidence of the social aspects of their relationship, this was not the case for the entirety of their relationship including when the sponsor was working more sociable hours early in the claimed relationship. Read in this way, the lack of evidence of the social aspects of the relationship is only partially excused.
47. Turning lastly to the basis on which the parties plan and undertake joint social activities, in their statements of September 2015 the parties said that they went out for meals, watched movies and attended nightclubs. At hearing, the applicant told the Tribunal that the parties did not travel but did attend birthday parties together. While the parties have submitted some photographs showing them at engagements (mainly family engagements), these photographs and the evidence of the parties do not satisfy the Tribunal that they planned and undertook joint social activities at the time of application, and this evidence is given little weight of a positive nature. Furthermore, owing to the cessation of the parties' relationship in 2018, the Tribunal is not satisfied that they presently plan and undertake joint social activities. This aspect is also given little positive weight.
48. The Tribunal has considered the above evidence. Based on the evidence, it finds that the parties have represented themselves to family members but few others as being in a married relationship. It finds that they have not represented themselves as being in a married relationship to the Form 888 declarants even in spite of these declarants being friends who visit the sponsor's family often. It finds that the sponsor had not changed his marital status on Centrelink but had continued to represent himself to this agency as being single despite being married. It finds that the parties have not socialised widely but have mainly provided evidence of attendances at family events and not at events involving a wider group of friends and acquaintances. The Tribunal is not overall satisfied that the evidence points to the

parties being in a genuine and continuing relationship at the time of application and at the time of this decision.

Nature of parties' commitment to each other

49. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term.
50. The parties claim to have met in February 2014 at a beauty salon operated by the sponsor's mother where they both claim to have been working at that stage. The parties claim to have exchanged contact details and to have contacted each other regularly. In late March 2014, they claim to have begun a boyfriend-girlfriend relationship, the applicant having moved into the sponsor's house earlier that month. In March 2015 the parties claim that the sponsor proposed to the applicant who said yes, and the parties submitted to a wedding ceremony in August 2015 before later celebrating a reception in September 2016. The visa was applied for on 30 September 2015.
51. The Tribunal has had particular regard to evidence from the applicant in response to the Tribunal's s.359(2) letter and at hearing that she no longer lives with the sponsor but lives at another address in Springvale South with her 17-month-old Australian citizen child who was born to another man. This evidence is given significant weight of an adverse nature in the Tribunal's assessment of the nature of the parties' commitment to each other.
52. The Tribunal has considered the evidence in relation to the nature of the parties' commitment to each other, including statements by the parties which speak to the claimed development of their relationship above. However, these statements are not detailed in relation to other aspects of their relationship such as the degree of companionship and emotional support the parties draw from each other or whether the parties view their relationship as long-term.
53. At hearing, the applicant was asked about instances where the parties drew companionship and emotional support from each other, and she said that they became very close when she moved into the house. She said that she was new to Australia and the sponsor helped her by driving her around. She said that she put her trust and confidence in him. She said that when she met the sponsor she really fell in love with him and wanted a long relationship and not a short-lived one. She said that he was a very good boyfriend. The Tribunal acknowledges her testimony. While for present purposes it may accept that there was an intention on her part to have a committed and long-term relationship, other evidence such as the sponsor's infidelity and his habit of transferring money away from the parties' joint account demonstrates to the Tribunal's that this intention never eventuated.
54. In relation to the question of whether the parties view their relationship as a long-term one, clearly this is not the case at the time of this decision based on its cessation. The Tribunal acknowledges that the sponsor made a binding superannuation nomination in favour of the applicant in 2015, but there is little other evidence to show that the parties viewed their relationship as a long-term one at the time of application. Indeed, evidence from the applicant at hearing regarding the sponsor's infidelity and the tendency for him to transfer money away from the joint bank account strongly suggests he did not view the relationship as long-term, whatever her feelings. This evidence is given weight of an adverse nature.
55. The Tribunal has considered the above evidence. It finds that the applicant has a 17-month-old child but finds that this child is a product of another relationship. It finds that there is insufficient evidence at the time of application and at the time of this decision in relation to

the aspects of the nature of the parties' commitment to each other that would demonstrate that the parties drew and continue to draw companionship and emotional support from each other, or that they ever viewed their relationship as a long-term one, and this evidence is outweighed by other adverse evidence. This is especially so in light of the applicant's admissions that the parties no longer live together and have not spoken since 2018.

56. Having considered and balanced the evidence in front of it, the Tribunal is not satisfied that it points to the parties being in a genuine and continuing relationship. The Tribunal is also not satisfied that the evidence indicates the parties have a commitment to a shared life as a married couple to the exclusion of all others. Lastly, the Tribunal is not satisfied that the evidence indicates the parties live together, or do not live separately and apart on a permanent basis at the time of this decision.

CONCLUSION

57. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or at the time of this decision. The Tribunal is not satisfied based on the evidence that the parties' relationship was ever genuine and continuing or that the parties ever had a commitment to a shared life as a married couple to the exclusion of all others. Finally, while the parties may have been living together at the time of application, the Tribunal is not satisfied that they were living together, or not separately and apart on a permanent basis, at the time of this decision.
58. At the time of application, s.5F(2)(b), and s.5F(2)(c) are not met, and at the time of decision s.5F(2)(b), s.5F(2)(c) and s.5F(2)(d) are not met
59. Therefore, the applicant does not meet cl.820.211(2)(a) or cl.820.221.
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

MINISTERIAL INTERVENTION

61. At hearing, the applicant admitted that her relationship had ceased. Through questioning, the Tribunal ascertained that she was not seeking to rely on any of the exceptions under cl.820.221(2) or cl.820.221(3). She instead requested the Tribunal to refer her matter to the minister for his intervention.
62. Ministerial intervention is a discretion given to the minister to substitute for a decision of the Tribunal another decision that is more favourable to the applicant if the minister thinks it is in the public interest to do so.
63. The applicant said that she came to Australia all by herself, so that when she met the sponsor she put her trust and confidence in him. She said that when she met the sponsor she really fell in love with him and wanted a long relationship and not a short-lived one. She said that he was a very good boyfriend. She said that after she found out that he had a child, he apologised and promised that he would change, but probably because of the love he had for his son he kept going to see his child and it hurt her a lot.
64. The applicant said that after she moved out of the sponsor's house, she met the father of her child and they moved in to stay together. However, after she found out that she was pregnant, the child's father did not want anything to do with it, telling her to make a choice between him and the baby. The applicant told him that I wanted both. She said that she was under a lot of stress at this time. She said that the father of her child left her when she was six months pregnant. She said that it was very difficult for her not having her mother or family to help her.

65. The applicant said that the stress continued after the child's birth. She said she would cry every day and had wanted to kill herself. She said that the child's father made contact when her child was nearly one year and agreed to put his name on the birth certificate. She said that he does not come to visit and she is here by herself and it is difficult for her.
66. The Tribunal gave the applicant 14 days in which to provide further information. Within this time, the applicant provided the birth certificate and passport for her daughter, along with an email that relevantly provided as follows:

I would like to provide further information for a referral for Ministerial Intervention.

I have a daughter name [] born on **12/04/2019**. My daughter is an Australian citizen by birth. Please see the attached birth certificate, passport and Australian citizenship certificate.

I would like to apply for a Parent visa in Australia which enable me to stay in Australia to take care of my daughter. Without a Ministerial Intervention, I will not be able to apply for any other visa in Australia and I have to leave this beautiful country.

If I have to leave Australia, my daughter has to be with me.

However, my daughter's father is living in Australia. It would be a huge disadvantage to my daughter if she cannot see her father often, especially at this young age.

Therefore, I hope the Member will refer my case to the Minister so I can be granted a new temporary visa to apply for a Parent visa in Australia.

67. The Tribunal has considered the minister's guidelines when coming to a decision about whether to make a referral to him for intervention under s.351, including those relating to "unique or exceptional circumstances". It notes the applicant's claim to have given birth to a child on 12 April 2019 who is an Australian citizen by virtue of the child's father being an Australian citizen. The Tribunal has been provided with a birth certificate registered on 17 February 2020 showing the child's mother and father. It has also seen the child's Australian passport dated 10 August 2020 that lists her nationality as Australian.
68. The Tribunal has not undertaken a verification process to ascertain the genuineness or otherwise of the documents provided or their contents. It suffices for the Tribunal that the characteristics of the child vis-à-vis the purported father are consistent with them being related. The Tribunal accepts, based on the evidence before it, that the applicant's daughter is an Australian citizen and therefore she and her daughter may be characterised as an Australian family unit. It has considered that there is contradictory evidence in relation to the presence of the father of the Australian citizen child in her life – with the applicant telling the Tribunal at hearing that he does not come to visit them but then stating in her response that her daughter would not be able to see him often if they were to return to Vietnam. It accepts, however, that things might well change and that it would be in the best interests of the child to at least advert to the possibility that her father may play a role in her upbringing.
69. Based on the evidence in front of it, the Tribunal accepts there are strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the applicant's family unit, including the applicant's Australian citizen child. Accordingly, the Tribunal has chosen to refer this matter to the minister.

DECISION

70. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).